Be-Lo Stores *and* United Food and Commercial Workers Union, Local 400. Cases 11–CA–14586 (formerly 5–CA–21583), 11–CA–14712 (formerly 5–CA–22344), 11–CA–14775–1 (formerly 5–CA–21852), 11–CA–14775–2 (formerly 5–CA–21880), 11–CA–14775–3 (formerly 5–CA–21975), 11–CA–14775–4 (formerly 5–CA–21991), 11–CA–14775–5 (formerly 5–CA–22015), 11–CA–14775–6 (formerly 5–CA–22078), 11–CA–14775–7 (formerly 5–CA–22082), 11–CA–14775–8 (formerly 5–CA–22106), 11–CA–14775–9 (formerly 5–CA–22139), 11–CA–14775–10 (formerly 5–CA–22185), 11–CA–14793–1 (formerly 5–CA–22430–1), 11–CA–14793–2 (formerly 5–CA–22430–2), 11–CA–14793–3 (formerly 5–CA–22430–3), 11–CA–14793–4 (formerly 5–CA–22430–4), 11–CA–14793–5 (formerly 5–CA–22430–5), and 11–CA–14811 (formerly 5–CA–22449)

October 29, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On September 7, 2000, Administrative Law Judge Jane Vandeventer issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Be-Lo Stores, Norfolk, Virginia, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State laws:

Kelly Boone	$25,850.17
Jamie Wischmann	10,333.81
	$36,183.98

and shall further pay 401(k) plan moneys, plus accrued earnings computed in the manner prescribed in *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979), in the following amounts:

Kelly Boone	$6,955.10
Jamie Wischmann	8,065.45
	$15,020.55

Ronald C. Morgan, Esq., for the General Counsel.
Stanley Barr Jr. and *Kristan B. Burch, Esqs*. *(Kaufman & Canoles)*, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on May 2–4, 2000, in Norfolk, Virginia. This is a supplemental proceeding for the purpose of determining the remedy due two employees found by the Board to have been unlawfully discharged by Respondent in the Board's Decision and Order, found at 318 NLRB 1 (1995).

Respondent operates grocery stores in the Norfolk, Virginia area. The Board's decision found Respondent had engaged in numerous violations of the Act during an organizing campaign among Respondent's employees in 1990–1991.

The compliance specification herein issued on December 30, 1999, and an amended compliance specification issued on March 1, 2000. Respondent filed answers to the compliance specifications taking issue with certain of the allegations of the compliance specifications. During the trial, the allegations involving four of the employees were settled with the agreement of all parties, and those allegations have been withdrawn.[1] Remaining for decision are the allegations respecting Kelly Call Boone (Boone) and Jamie Wischmann (denoted as Cottrell in the compliance specification and at some places in the record and called Wischmann herein).

After the conclusion of the trial, the General Counsel filed a motion to receive into the record the second amended compliance specification, and Respondent filed an opposition to the motion. In addition, the parties filed briefs, which I have con-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Chairman Hurtgen finds without merit the Respondent's assertion that the fact that discriminatees Boone and Wischmann accepted part-time employment during certain quarters of the backpay period evidences a failure to make a reasonable effort to mitigate their losses arising from their discharges. There is no evidence in the record that either Boone or Wischmann was offered or refused either additional part-time employment or full-time employment during those quarters. By contrast, in *Acme Bus Corp.,* 326 NLRB 1447, 1447–1448 (1998), a case cited by the judge in her supplemental decision, discriminatee Anderson conceded that he could have worked in part-time positions for two different employers, but chose not to do so because he preferred to work for only one employer. In his dissent in that case, Chairman Hurtgen found that Anderson's failure to take advantage of the opportunity for employment because of a "mere preference" to work for only one employer evidenced a lack of a reasonable effort to mitigate losses. As explained above, however, that is not the case here.

[1] At trial, I approved settlement of the backpay claims of Sabrena Frazier, Angela Hollingsworth, Kim Howell, and Lavonne Williams.

sidered. Attached to the General Counsel's brief were amended appendices for Boone, correcting an arithmetical error which was contained in the second amended compliance specification, as pointed out by Respondent in its opposition to the General Counsel's motion. The amounts calculated for Wischmann are unchanged from the amended compliance specification.

I grant the General Counsel's motion to receive into the record the second amended compliance specification and the subsequently corrected appendices relating to Boone, but I admit them as recalculations, rather than as amended pleadings. One correction in the second amended compliance specification is the deletion of the paragraphs and appendices relating to the four settled individuals. Respondent does not object to this change. Respondent does, however, oppose the other corrections embodied in the second amended compliance specification, specifically the change in the annual raises calculated for Boone. The General Counsel contends that these changes are recalculations based on the testimony of Respondent's witness Steve Rosa at the trial in this matter, detailing the policy for according and calculating raises at Respondent. The General Counsel cites *Minette Mills, Inc.*, 316 NLRB 1009, 1014 (1995), in which the administrative law judge admitted recalculations of backpay submitted after the close of the hearing. More persuasive, perhaps, is *Intermountain Rural Electric Assn.*, 317 NLRB 588, 590 (1995), in which the Board reversed an administrative law judge's refusal to admit, over a respondent's objection, recalculations of backpay which the General Counsel attached to his brief. There, too, the recalculations were made to comport with evidence adduced at the hearing. The Board noted that, as directed in NLRB Casehandling Manual (Part Three) Compliance Sec. 10630.1, the compliance officer testified at the hearing how the new evidence would affect his calculations. At the hearing in the instant case, the compliance officer testified as to how the evidence concerning Respondent's raise policy would affect his calculations. I find that the recalculations submitted with the General Counsel's brief concerning Boone reflect accurately the compliance officer's testimony as to his recalculation of Boone's raises during the backpay period. I further find that the issue was fully litigated at the hearing.

Respondent has objected to the receipt of the recalculations on the ground that the General Counsel should have subpoenaed the documents pertaining to Respondent's raise policy at an earlier time, and therefore have calculated the raise correctly in the initial compliance specification. I note that Respondent was required by the Board's order in the underlying unfair labor practice case to provide the Regional Director with its "personnel records and reports, and all other records necessary to analyze the amount of backpay and other moneys dues under the terms of this order." I find this description includes the documents describing Respondent's raise policy, and accordingly, Respondent is at least as culpable as the General Counsel for the delay in providing and analyzing the raise policy documents which were first produced at the compliance hearing. Also, as Respondent has specifically defended itself on the raise issue, as it was alleged in the initial compliance specification, I find that Respondent has not been harmed by the delay in correcting the calculations.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. THE FACTS

A. The Board's Decision

In its decision cited above, the Board found, among other things, that Respondent had discharged Kelly Call (since remarried and herein referred to as Kelly Boone or Boone) and Wischmann unlawfully, and directed Respondent to make them whole for any loss of pay and other benefits they suffered by reason of its unlawful discrimination against them. The United States Circuit Court enforced the Board's Order as to Boone and Wischmann. Respondent disputes the amount of backpay and retirement plan contributions calculated by the General Counsel to be due these two discriminatees.

Respondent does not dispute the period of backpay, except for its contentions that the discriminatees each incurred willful loss of earnings for certain portions thereof, as set forth below. Neither does Respondent dispute the method used to calculate backpay: the use of a comparable group of its employees as a measure of the backpay owed to each discriminatee. Respondent does, however, dispute the allegation that 401(k) retirement plan contributions are due both discriminatees, the annual raise percentages calculated for Boone, and certain moving expenses incurred by both discriminatees. Respondent also contends both discriminatees incurred willful loss of earnings in a number of ways, such as by moving and by quitting certain interim employment.

B. The 401(k) Plan

Some months after Respondent's discrimination against Boone and Wischmann, Respondent initiated a 401(k) plan for its employees. Boone and Wischmann would have become eligible to participate in the plan as of October 1, 1991, had they continued to be employed by Respondent. Under the plan, employees could choose to contribute up to 15 percent of their earnings, and Respondent would match half the employee's contributions up to a maximum of 6 percent (employee contribution), constituting an employer contribution of 3 percent. Under the plan, if an employee contributed 6 percent of her earnings, Respondent would contribute an additional 3 percent of the employee's earnings to the plan. If an employee contributed 5 percent of her earnings to the plan, Respondent's contribution would be an additional 2-1/2 percent of her earnings.

C. The Wage Increases

The General Counsel calculated annual wage increases for both discriminatees based on the annual raises granted to employees in the comparable group of employees. Steve Rosa, Respondent's director of human resources, testified about Respondent's policy on wage increases since 1995, when he assumed his position. If an employee received a satisfactory performance evaluation, the employee would be accorded a wage increase. In addition, there were prescribed "salary ranges" for particular job classifications. Employees whose

wages were below the minimum would be brought up to at least the minimum figure in the range.

The compliance officer, Earl Pfeffer, testified that he calculated wage increases for the discriminatees by averaging the percentage increase for the employees in the comparable group who received raises. In several years all eight employees in the comparable group received raises, and in those years, he averaged the raise percentage among all eight employees. In years in which fewer of the eight employees received raises, for example five of eight employees, the compliance officer averaged the raise percentages of the five employees who did receive raises. He explained that the two discriminatees were assumed to be at least satisfactory employees throughout the backpay period, and thus entitled to a wage increase. Therefore, he averaged the raises of other satisfactory employees in the comparable group in order to arrive at a percentage raise for the discriminatee for that year. In 1995, Boone's wage rate fell below the "salary range" for her job classification, produce manager. In that year, her wage rate was increased to the minimum figure in the "salary range" instead of being calculated on a percentage basis.

D. Kelly Boone

Kelly Boone was a recently promoted produce manager at the time of the discrimination against her. She began interim employment immediately, working for the Union as a paid picketer, a job that was by its nature temporary, and expected to last only so long as the Union continued its organizing campaign. Some time before the job with the Union was to end, she began work part time at another grocery store, Super Fresh. When the union job ended in March 1993, she continued to work at Super Fresh. Not only was this job part time, it paid a lower hourly rate than her job at the Employer and did not include medical insurance.

In February 1994, due to financial reverses in her family, including a rental property in Lockport, New York, which was yielding no rent and was deteriorating, she visited Lockport to investigate. Finding that the property needed immediate attention, and being assured by a relative in Lockport that job opportunities were reasonably good, Boone and her husband-to-be moved to Lockport, New York, where Boone had grown up and where her father still lived. Boone testified that with only a part-time job in Norfolk, expected medical expenses, and rental expenses, she and her family could no longer afford to stay in Norfolk, but moved to Lockport to recoup her investment in the property, live more cheaply, and to look for work. There they lived in Boone's property, saving rental expenses.

From April 1994, through her August 1994 employment, the General Counsel has conceded that Boone was not in the labor market, due to the birth of a child. At the end of that period, she began work at Udder Delights, but as this was a seasonal job, she soon secured other employment with Shannon Donuts. After assigning Boone to a regular schedule for some weeks, this interim employer began to change Boone's shifts continually, making it impossible for her to make adequate child care arrangements. Boone was obliged to quit her job at Shannon Donuts in September 1994, due to the problems with child care arrangements. She next secured employment in January 1995, at a company marketing vitamins by telephone. Boone testified this employer insisted its employees assure customers they themselves had used the product and achieved good results. As Boone saw it, she had to lie to potential customers. This made her so uncomfortable that she quit this job. Within a week, however, she had secured another job at Penn Traffic, a company which operates grocery markets. Employed initially in a part-time capacity, Boone worked her way into a full-time job, and was still employed there at the time of the compliance hearing. Boone had interim earnings in every quarter of her 7-year backpay period except for the quarter in which she withdrew from the labor market due to her childbirth leave.

With respect to the Employer's 401(k) plan, Boone testified that she would have joined it as soon as it was offered and that she would have contributed 5 percent of her earnings to the plan.

E. Jamie Wischmann

Jamie Wischmann had worked for Respondent as a meat wrapper for about 7 months at the time she became ill with cancer in the spring of 1991. She required emergency surgery. Respondent discriminatorily discharged Wischmann in April 1991.

After her discharge, Wischmann, like Boone, initially worked for the Union as a paid picketer. Near the end of the year, she was still working in this temporary capacity, and her husband was employed as a telephone salesperson, despite training in electronics. Wischmann's father lived in Indianapolis, and encouraged the couple to move there, informing them that there were jobs available. On cross-examination, Wischmann stated that she had been informed Indianapolis was a "growing community" and there was "a lot of work." In December 1991, Wischmann's husband secured a better job in Indianapolis, and Wischmann's father assured her that he had lined up a job for her at the Indianapolis Zoo. Wischmann testified that the family's reasons for moving were: (1) she believed she had a job; (2) her husband did have a job; and (3) she believed there were better overall job opportunities in Indianapolis. She resigned her job with the Union, and in early January 1992 moved to Indianapolis.

On arriving in Indianapolis, Wischmann learned that she did not, after all, have a job at the Zoo, which her father had exaggerated or invented the job in order to induce her to move there. This precipitated an unfortunate family estrangement, but Wischmann immediately began to search for work. She found a job as an animal caretaker at a rat farm, but quit after 1 day because the working conditions were extremely repulsive, dealing as they did, with thousands of rats and mice, both dead and alive. Shortly thereafter, Wischmann began work at Wendy's.[2]

In July 1992, Wischmann was offered what appeared to be a better paying position as an apartment cleaner. When that job

[2] At the unfair labor practice hearing which occurred in March 1992, during her testimony Wischmann stated that she was working at the Indianapolis Zoo. During the compliance hearing, she admitted that she had done so, and explained that she felt "embarrassed and humiliated" by her father's actions and the subsequent estrangement. This was why she attempted to keep the whole painful episode from her friends and former coworkers in Norfolk.

turned out to be lower paying than she had been led to believe, as well as harder work and fewer hours, Wischmann quit that job and began other employment without any break. Her next interim employment was with a dry cleaner. After about 6 months, she was discharged from the dry cleaner job due to what she described as a "personality conflict" with the supervisor which had arisen because of what Wischmann perceived as the supervisor's demands for unreasonable amounts of overtime.

Within weeks, Wischmann again secured employment with a temporary service, and worked nearly 2 years at a Pepsi-Cola bottling plant. She quit that job in late 1994 due to what Wischmann perceived as resentment of temporary employees like herself by the regular Pepsi employees. Within a week, she was again employed by a temporary service, this time working for the Muscular Dystrophy Association (MDA), where she has continued to be employed, either by a temporary service or by MDA itself, since early 1995. Wischmann had earnings from interim employment in every quarter of her 7-year backpay period, and her earnings from her interim employment exceeded her gross backpay in 17 of the last 20 quarters of the period.

Wischmann testified that had she remained at Respondent, she would have contributed 6 percent of her earnings to the 401(k) plan.

II. DISCUSSION AND ANALYSIS

A. Applicable Legal Principles

As was stated in *LaFavorita, Inc.*, 313 NLRB 902 (1994):

> It is well settled that the finding of an unfair labor practice is presumptive proof that some backpay is owed . . . and that in a backpay proceeding the sole burden on the General Counsel is to show the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct.

While the General Counsel has some discretion in choosing a method for calculating backpay, he should select the formula which will closely approximate the amount due. *Minette Mills, Inc.*, 316 NLRB, supra at 1010.

The burden then shifts to Respondent to show any affirmative defenses which would reduce its backpay liability, such as interim earnings, willful loss of earnings, insufficient job search, or other defenses. Any uncertainties should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

While a discriminatee is obliged to make reasonable efforts to secure and hold interim employment, the burden is on Respondent to show a failure to satisfy this obligation. With respect to the discriminatee's obligation, the Board has held that "the standard is that of *reasonable* diligence, not the highest diligence, [and] that the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not based on isolated portions of the backpay period." *Electrical Workers Local 3 (Fischbach & Moore)*, 315 NLRB 1266 (1995).

B. The 401(k) Issue

Respondent argues that it should have no liability for employer contributions to the 401(k) plan because the discriminatees are ineligible for the plan, as they were terminated before the plan was instituted. Since the terminations to which Respondent refers were found to be unlawful, it is difficult to grasp what Respondent could mean by its argument. Not surprisingly, Respondent cites no legal support for this proposition. It is precisely because of Respondent's unlawful terminations that Boone and Wischmann are to be made whole. It is settled Board law, and Respondent does not argue otherwise, that retirement contributions are part of a "make-whole" remedy, and are necessary to place the discriminatees in the position they would have occupied but for Respondent's discrimination against them. I reject Respondent's contention and find that the discriminatees are entitled to participate in the 401(k) plan as if they had been employed throughout the backpay period.

Another argument raised by Respondent is that contribution to the 401(k) plan is entirely voluntary, and the contributions named by the discriminatees as what they would have contributed to the plan are too high. Boone's contribution would have been 5 percent, a modest figure, considering that the upper limitation is 15 percent. The fact that she did not name 6 percent is supportive of her honesty in this respect, since 6 percent would maximize Respondent's contribution. Respondent points to Boone's failure to contribute to the only 401(k) plan in interim employment, which has been available to her, in a time period after the end of the backpay period. As there has been no showing that the plans are comparable, for example that there is any matching employer contribution, I find this contention unpersuasive, and pure speculation on the part of Respondent. I find that Boone would have contributed 5 percent of her earnings to Respondent's 401(k) plan during the backpay period, had she continued to be employed at Respondent.

With respect to Wischmann, the figure she testified she would have contributed is 6 percent. As Wischmann has no children to add expenses to her family budget, it is entirely reasonable that she would have chosen the figure, which would maximize the employer's contribution. Respondent has adduced no actual evidence that either employee would have chosen not to participate in the plan; it has at most expressed its skepticism. In compliance matters, any doubt must be resolved against the wrongdoer,[3] and I find Wischmann would have contributed 6 percent of her earnings to the 401(k) plan, had she continued to be employed at Respondent. I further find that Respondent must make whole Boone by payment of $6955.10 and Wischmann by payment of $8065.45 in retroactive 401(k) contributions, plus accrued earnings computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

C. The Wage Increase Calculations

Respondent contends in its answer that neither discriminatee would have received any wage increases throughout the entire

[3] See, e.g., *Minette Mills, Inc.*, 316 NLRB, supra at 1011.

backpay period other than those required to comply with minimum wage laws. According to Respondent's policy, this would mean that both employees would have had to be evaluated each year of the backpay period as less than satisfactory employees. Respondent adduced no evidence whatever to support this contention with respect to Boone. The fact that Boone had been promoted to produce manager is an objective indication that she was considered to be more than satisfactory. With respect to Wischmann, Rosa testified that although he had no first hand knowledge of her job performance, he had reviewed her personnel file and found one warning. Apparently on this basis, he opined that she would not have been rated a satisfactory employee in any of the 7 years of the backpay period, including the 4 years before he became Respondent's director of human resources. I accord no weight whatever to this fanciful testimony.

Respondent also contends the General Counsel erred by computing the average raise using only those comparable employees who received a raise in a particular year, rather than all eight employees in the comparable group. I find that the General Counsel employed the most reasonable and accurate method of computing the raises, which the discriminatees would have received. The General Counsel, by using only those employees who actually received raises, was adhering to the Respondent's policy. Respondent gave raises only to satisfactory employees. As I find the discriminatees would have been rated as satisfactory employees had they remained at Respondent, they must be treated like the other satisfactory employees, that is, those employees who received raises. It would penalize Boone and Wischmann unfairly to dilute the raise by including unsatisfactory employees in the average.

As in *Baumgardner Co.*, 304 NLRB 526, 527 (1991), the raises here were calculated based on those accorded comparable employees, and in addition, the particular policy of Respondent was followed in averaging the raises. Accord: *Churchill's Supermarkets*, 301 NLRB 722, 723 (1991). I find no evidence to support Respondent's bare assertion that the discriminatees would not have received any wage increases exceeding minimum wage rates during the backpay period. If any doubt could be raised about the employees' having been rated as satisfactory employees, and thus entitled to wage increases in the same manner as comparable employees, that doubt must also be resolved against Respondent.

D. Kelly Boone

Respondent contends that Boone incurred a willful loss of earnings by quitting several jobs and by moving to Lockport, New York. Respondent also contends that Boone's period of absence from the labor market because of the birth of her second child should be 10-1/2 months rather than the 5 months accorded by the General Counsel.

Boone's second child was born in April 1994, and she returned to work on August 8, 1994, at Udder Delights. As this was a seasonal job, when it ended, she went to work at Shannon Donuts. After quitting that job, she continued her search for work until she secured her next job at Vita Systems, at which time, Respondent contends, she returned to the labor force. Respondent adduced no evidence of Boone's incapacity to work due to childbirth, nor any evidence of medical reasons necessitating a prolonged childbirth leave. Contrary to Respondent's contention, the evidence that Boone worked through most of August and September of 1994 is probative of her capacity to work. The cases cited by Respondent concerning childbirth leave involve either shorter periods of withdrawal from the labor market than the 5 months here or involve some illness or complications which prevented the individual from returning to work for longer than a normal leave. There has been no evidence adduced which would justify the 10-1/2–month period asserted by Respondent, and such a bare assertion is insufficient to carry Respondent's burden of showing willful loss of earnings during this period by Boone. I find that the 5–month period of withdrawal from the labor market reflected in the compliance specification is supported by the evidence and is reasonable.

With respect to Boone's move to New York with her family in order to seek less expensive living quarters as well as other interim work, Respondent contends that the move was for "personal reasons" and Boone's quitting of her job at Super Fresh was a willful loss of earnings. Since Boone's Super Fresh job was part time and did not include medical insurance, it was not substantially equivalent to her job at Respondent. It is well settled that quitting a job that is not substantially equivalent will not be found to constitute a willful loss of earnings. *Glover Bottled Gas Corp.*, 313 NLRB 43 (1993). Boone moved with her family in order to find jobs that would pay their living expenses. The Board has specifically found in *WHLI Radio*, 233 NLRB 326, 330 (1977), that an employee who returned home with her husband to seek another job that would pay their living expenses was not a willful loss of earnings.

Respondent has also contended that Boone's family moving expenses of $915 should not be allowed as a deduction from interim earnings.[4] Where it is found that a discriminatee's move in order to seek better opportunities is not a willful loss of earnings, the expenses of the move are fully deductible as expenses of seeking employment. *Baddour, Inc.*, 304 NLRB 681, 682 (1991); *Big Three Industrial Gas*, 263 NLRB 1189, 1202–1203, 1206 (1982).

Respondent has contended that Boone incurred a willful loss of earnings by quitting two other interim jobs, Shannon Donuts and the telemarketing job. Boone was obliged to leave Shannon Donuts because that interim employer began to change her shifts constantly, making it impossible for her to secure child care arrangements. Her schedule at Respondent was regular and predictable. It is well settled that a job on a different shift is not substantially equivalent, and quitting such a job will not be considered a willful loss of earnings. *Big Three Industrial Gas*, supra, 263 NLRB at 1211. Likewise, quitting interim employment because of child care problems which did not exist at the gross employer's does not constitute willful loss of earnings. *Twistex, Inc.*, 291 NLRB 46, 49 (1988).

With respect to the job selling vitamins at which Boone was required to lie to potential customers, the Board has held that

[4] Respondent contends that a portion of the move is attributable to Boone, to whom Boone was not yet married in February 1994. I decline to divide the family's moving expenses for this reason.

quitting interim employment which requires participation in unlawful or immoral practices is not only justified, it also shows that the employee has "good moral and legal sense." *Churchill's Supermarkets*, supra, 301 NLRB at 727. See also *Hansen Bros. Enterprises*, 313 NLRB 599, 607 (1993).

To the extent Respondent argues that acceptance of part time work by Boone and Wischmann was a willful loss of earnings, it has not been demonstrated on this record that full time work was offered to or refused by either individual, and thus, Respondent has not carried its burden of showing willful loss of earnings on this basis. *Acme Bus Corp.*, 326 NLRB 1447 (1998); *Otis Hospital,* 240 NLRB 173, 175 (1979). In addition, the acceptance of part time work reduced Respondent's backpay liability in every quarter of the backpay period. Boone's history of seeking and obtaining interim employment and the fact that she had interim earnings in every quarter in which she was in the labor market do not demonstrate willful loss of earnings. Viewing the whole backpay period, the evidence demonstrates Boone's diligence and responsibility in discharging her obligation to mitigate Respondent's damages. *L'Ermitage Hotel*, 293 NLRB 924, 927 (1989); *Retail Delivery Systems*, 292 NLRB 121, 125 (1988). I find that Boone is entitled to backpay in the amount of $25,850.17, exclusive of interest, as shown in the General Counsel's amended appendix I, attached to the General Counsel's brief.

E. Jamie Wischmann

Respondent contends that Wischmann incurred willful loss of earnings by quitting her temporary union job and moving to Indianapolis in January 1992, as well as by quitting interim employment with Wendy's and as an apartment cleaner, and by being discharged from the job at the dry cleaners. Respondent argues that Wischmann's short periods between jobs show a failure to mitigate damages which amount to willful loss of earnings. Respondent's contentions are unsupported by the evidence and are rejected.

Wischmann moved to Indianapolis in order to look for employment, and to accompany her husband, who had secured a job there. Respondent elicited testimony from Wischmann to the effect that Indianapolis was a growing community and there was a lot of work there, thereby demonstrating that it was an area with at least comparable, and possibly superior, job opportunities to Norfolk. She quit a temporary job with the Union in order to do so. In these circumstances, where the interim job she left was not substantially equivalent to her job at Respondent, she did not incur willful loss of earnings. *Glover Bottled Gas Corp*., supra 313 NLRB at 43; *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, 41 (1991). In *Sorenson Lighted Controls*, 297 NLRB 282, 282–283 (1989), the Board found that a discriminatee who moved with her husband because he had a job at the new location and the family needed the money to live was justified in so doing, and did not incur a willful loss of earnings by the move. I find Wischmann's moving expenses are appropriately deducted from her interim earnings.

Wischmann's quitting of her interim job at Wendy's was undertaken because she had the offer of the job cleaning apartments, which was represented to her as being superior in pay and work opportunities. When that did not develop as expected, she left that job *with no idle time between* and went to work for the dry cleaners. Wischmann's discharge from the dry cleaners must be assessed by the Board's standard as reiterated in *Basin Frozen Foods*, 320 NLRB 1072, 1076 (1996). In order to show willful loss of earnings, a respondent must show that the employee was terminated for "deliberate or gross" misconduct. As has been specifically held by the Board, the reason given by Wischmann for her discharge, a "personality conflict" with the supervisor, is not misconduct and does not satisfy Respondent's burden. *Arthur Young & Co.*, 304 NLRB 178, 180–181 (1991). I find that Wischmann was not discharged for misconduct, did not quit any job without justification, and did not incur a willful loss of earnings.

Respondent argues that Wischmann's admitted falsehood in March 1992, mandates findings against her in the willful loss of earnings issues it has raised. Contrary to Respondent, I find that, blameworthy though Wischmann is for placing feelings of "embarrassment and humiliation" above her obligation to tell the truth, this particular falsehood does not affect any of the issues in this case. Wischmann's history of interim employment was not dependent on her unsupported testimony, but was corroborated by those entities' business records and other government data. There was no evidence offered which contradicted Wischmann's testimony concerning her reasons for quitting certain of her interim jobs, her reasons for moving, nor her contribution to the 401(k) plan, and thus her credibility in this proceeding is not in issue.

In addition, when assessing Wischmann's activities during the backpay period, it is worthy of note that she continually sought and obtained new interim employment with sufficient energy and success that she had interim earnings in *every quarter* of a 7-year backpay period. In 20 of the 30 quarters of her backpay period, Wischmann earned more than she would have earned at Respondent, and therefore Respondent's liability for two-thirds of the backpay period is zero. This is not the record of a person who incurs a willful loss of earnings. I find that Wischmann is entitled to backpay in the amount of $10,333.81, exclusive of interest, as shown in the General Counsel's Appendix J contained in the second amended compliance specification, attached to the General Counsel's motion dated May 10, 2000.